No. 07-199

11-8-07

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. MARSHALL, Warden, *Petitioner*,

v.

ROBERT HENRY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may remand a case, which is not governed by the substantive provisions of the Antiterrorism and Effective Death Penalty Act, for an evidentiary hearing to determine whether the petitioner can adduce sufficient proof to substantiate a claim of actual innocence.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 07-199

CHARLES D. MARSHALL, Warden, *Petitioner*,

v.

ROBERT HENRY

Respondent, Robert Henry, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's interlocutory memorandum disposition in this case.[1]

STATEMENT OF THE CASE

I. Summary of the Factual Issues

Andre Johnson was murdered while standing next to the driver's door of his car. He was shot four times from a distance of five to fifteen feet. It is undisputed that the shots were fired from a stolen car that was driven by Francis Brewer. Bernard Oden was riding in the front passenger seat of the stolen car.

Robert Henry ("Mr. Henry" or "Robert") was convicted of the first degree murder of Andre Johnson on the sole theory of transferred intent. The State convinced Mr. Henry's jury that he hired Brewer to shoot Cedric Turner, who had stolen money and drugs from Mr. Henry, but Brewer mistakenly shot Johnson instead of Turner.

Brewer was tried after Mr. Henry on the same theory. Witnesses whose evidence was

[1] Respondent has no objection to Petitioner's jurisdictional statement.

unavailable at the time of Mr. Henry's trial testified in Brewer's trial that Oden intentionally shot Johnson for personal and independent reasons while Brewer drove by in the stolen car. Although the prosecution presented evidence that Oden was present when Mr. Henry allegedly offered to pay for an attack on Turner, the jury rejected the prosecution's first-degree murder theory, including the special allegation that Brewer personally used a firearm in the killing.

The jury convicted Brewer of second-degree murder, rejecting a special finding that Brewer acted for pecuniary gain. In other words, Brewer's jury rejected the prosecution's theory; he was *not* a participant in a premeditated killing instigated by the promise of payment from Mr. Henry, but instead was a participant in a spontaneous and unplanned act committed by Oden.[2]

The new testimony at Brewer's trial, reaffirmed in declarations filed with Mr. Henry's habeas corpus petition, thus showed that Mr. Henry played no role in Oden's shooting of Johnson.

II. Detailed Recitation of the Facts

1. During an early morning drug deal gone bad, Robert Henry, then 19 years old, was robbed of drugs and $30 by Cedric Turner. When Robert told his 16 year old brother, Jeffrey Taggart ("Jeffrey"), and his 17 year old cousin, Jester Taggart ("Jester"), what had happened, they decided Turner should be punished and get "a good ass whipping." Mr. Henry asked Francis Lee Brewer to injure or kill Turner. According to the government's theory of the case, later that day, Francis Lee Brewer saw Mr. Henry and others engaged in a heated argument with

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[2] This is the necessary implication of the jury's finding of second-degree murder, which is defined as any murder that does not have the elements of premeditation and deliberation, or was not committed by any of the means listed in the statute. See Cal. Penal Code § 190.

Andre Johnson and, mistakenly believing that Johnson was Turner, shot out the passenger side of a car and killed Andre Johnson. Mr. Henry was convicted of first degree murder, the trial judge finding the special circumstances of murder for profit and use of a firearm. He was sentenced to life without the possibility of parole.

2. Jeffrey testified at Mr. Henry's trial under a grant of transactional immunity that he, his brothers Robert and Gary, and his cousin Jester were brandishing sticks and confronted Turner, who had a gun. Turner retreated into a nearby house. After he was in the house about ten minutes, he came out with Andre Johnson. Turner got into Johnson's car. Mr. Henry and others asked Turner why he was getting in the car and having someone else fight his battle. At that point, Jeffrey testified, Johnson pushed Mr. Henry, and within minutes, a small stolen blue car driven by Brewer with Oden in the passenger seat passed by on the other side of the street, and Oden fired shots out of the driver's side window. Jeffrey testified that he was on the sidewalk near Johnson's car at the time the shots were fired.[3]

3. Two years after Mr. Henry was convicted, Brewer stood trial on the same theory that the prosecution asserted in trying Robert, that is, that Brewer was hired by Robert to kill Turner but mistakenly killed Johnson instead. The evidence at Brewer's trial, however, was markedly different than at Mr. Henry's.[4] At Brewer's trial, Jeffrey testified that he was in back seat of the

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[3] Jester, who went to trial ten days after the jury found Mr. Henry guilty, was convicted of second degree murder for which he received an eight year prison sentence.

[4] At Brewer's trial, as the prosecutor began asking Jeffrey about the car that Brewer and Oden were in on the night of the shooting, Jeffrey asked the judge if he still had the immunity he was granted at Mr. Henry's trial. The prosecutor interjected, "[a]t the earlier trial, he [*i.e.*, Jeffrey] requested immunity and the Court granted him the same, and I assume at this point he's asking for immunity." Jeffrey immediately corrected the prosecutor, saying "I didn't ask for it, he [*i.e.*, the prosecutor] gave it to me. I didn't ask for it. *I didn't know what he meant.*" Outside

small blue car with Brewer and Oden, and had been there for ten minutes before the shooting occurred. He testified that Oden took a rifle from between the front seats and shot Andre Johnson because Oden didn't like the way Johnson was talking. When Jeffrey was asked why he hadn't previously testified that he was in the car from which the shots were fired, he explained, "[b]ecause I was scared – like, that's why I wanted to see if I had immunity." And when asked by the prosecutor why he didn't testify similarly at Mr. Henry's trial, he answered, "[b]ecause I really didn't know what it [*i.e.*, immunity] meant. You didn't explain it to me, and I was still scared if I did say anything."

4. Jeffrey's testimony at Brewer's trial was corroborated by Charles Austin, who had not testified at either Mr. Henry's or Jester's trial.[5] Austin testified that he saw the shooting of Andre Johnson, and that the person who shot him was sitting in the passenger seat of the small blue car. He testified that he saw Brewer, who was driving the car and whose hands were on the steering wheel at the time the shots were fired, look "shocked" after Oden fired the shots. The jury found Brewer guilty of second degree murder and specifically rejected enhancements for personal use of a firearm and killing for a financial motive.

5. After Mr. Henry's conviction and sentence were affirmed on direct appeal, he sought habeas corpus relief in the state courts on the ground, inter alia, that he was actually innocent of

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the presence of the jury, the attorneys and the judge discussed the issue of immunity, with the prosecutor taking the position that the immunity granted at Mr. Henry's trial remained effective, but in an abundance of caution, the court should again grant immunity. When the judge asked Jeffrey if he understood the prosecution's request, Jeffrey replied, "Not really." Again, the matter was explained to Jeffrey, and ultimately the court granted him transactional immunity.

[5] The Warden mistakenly described Austin as Mr. Henry's "former jailhouse companion." (Pet. 14.) In fact, Austin shared a jail cell for approximately two months with Brewer, not Mr. Henry.

first degree murder. No evidentiary hearing was held, and in 1989 the California Supreme Court summarily denied relief without written opinion.

6. In 1994, Mr. Henry filed a pro se petition for writ of habeas corpus in the federal district court, asserting *inter alia* that he was actually innocent of first degree murder based on evidence from Brewer's trial. While the federal petition was pending, Mr. Henry filed another habeas corpus petition raising the actual innocence claim in the state supreme court. That court summarily denied the petition without holding an evidentiary hearing or making any findings of fact.

7. In 2005, the federal district court denied Mr. Henry's habeas corpus petition without holding an evidentiary hearing. In 2007, the court of appeals vacated the judgment and remanded the case for an evidentiary hearing. In a unanimous memorandum disposition,[6] the court emphasized that the case was not governed by the substantive provisions of the Antiterrorism and Effective Death Penalty Act, and therefore it was required to presume the correctness of state court factual findings "unless the record does not support the findings, or unless other defects, not at issue here, are present." (App. 2a) (citing 28 U.S.C. § 2254(d) [(1995)]; *Kuhlmann v. Wilson*, 477 U.S. 436, 459-60 (1986); *McKenzie v. Risley*, 824 F.2d 1525, 1531 (CA9. 1988) (en banc)). The court noted that Mr. Henry had not received an evidentiary hearing in the state courts, and concluded that, "Henry is entitled to an evidentiary hearing in the district court because if the newly-discovered evidence proves to be true, he would have made out a valid freestanding claim of actual innocence by 'affirmatively prov[ing] that he is probably innocent.'"

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[6] The Rules of the Ninth Circuit provide that "[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." 9th Cir. R. 36-3(a).

(App. 3a.) (citing *Carriger v. Stewart*, 132 F.3d 463, 476 (CA9 1997) (en banc), and *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993)). The court observed:

> If truthful, the testimony of Jeffrey Taggart and Charles Austin would prove that Henry, while possibly guilty of solicitation, conspiracy, and attempt for hiring a hit man, is not guilty of first degree murder.

(App. 4a.)

The Warden sought reconsideration, but the panel denied the petition, and not a single judge of the court of appeals requested a vote on the suggestion for rehearing en banc. (App. 5a.)

ARGUMENT

The Discretionary, Interlocutory Order for Fact-Development in this pre-AEDPA Case Raises No Issue of National Importance.

I. Summary of Arguments

There are several reasons why this case is inappropriate for review under this Court's Rule 10. *First*, because the federal petition was filed before 1996, the substantive provisions of the AEDPA are inapplicable. Accordingly, (a) a decision in this case would have little if any relevance to the vast majority of cases pending today, (b) the restrictions AEDPA place on a federal habeas court's choice of law, 28 U.S.C. § 2254(d), do not apply, and (c) all but two of the circuit cases cited by the Warden *were* governed by AEDPA, and all are inapposite.

Second, the court of appeals' interlocutory ruling simply provides a procedure for fleshing out the concrete facts so that "the legal question[ ] presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464,

472 (1982). The lower court's decision in this case requires the district court to ascertain the facts *before* it can be determined whether Mr. Henry "would have made out a valid freestanding claim of actual innocence by 'affirmatively prov[ing] that he is probably innocent.'" (App. 3a.) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (CA9 1997) (en banc) and citing *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993)). The Warden's question presented overstates the import of the lower court's decision. The lower court's unpublished memorandum provides that under the Ninth Circuit's test in *Carriger*, and the unique factual circumstances of this case, the district court should more fully develop the record.

Third, taking this case in interlocutory posture would be especially improvident in light of the serious nature of the Warden's claim. The Warden contends that even if someone is proven actually innocent in a federal habeas court, the court lacks the power to order him released and the State can still force the person to spend his entire life in prison. That conscience-shocking proposition is best considered in a case in which such a showing has been made, which will properly highlight the gravity of the constitutional question. Waiting for such a case will not significantly harm the State because these cases are exceedingly rare and the prospect of releasing someone, even Mr. Henry (in this case's current posture), is speculative at this point.

II. If the Court Were to Issue a Ruling in This Case, It Would Apply To, At Most, a Handful of Pending Pre-AEDPA Cases.

In this pre-AEDPA case, the lower court exercised its discretion to order development of the factual record so that, after the hearing, a determination can be made as to whether Mr. Henry would meet the high threshold established in *Carriger* for proving his innocence in a post-conviction setting. There is no contention that Mr. Henry was anything but diligent in pursuing

his claims in state court. Therefore, the restrictions this Court placed on evidentiary hearings in *Keeney v. Tamayo-Reyes*, 501 U.S. 1 (1992), and now codified in 28 U.S.C. § 2254(e)(2) (first clause), are not at issue.

That being so, the lower court in this case correctly identified the *pre*-AEDPA "reasonably low threshold" (App. 3A) that a federal habeas petitioner must meet in order to receive an evidentiary hearing, and cited language from *Townsend v. Sain*, 372 U.S. 293 (1963), that a petitioner need show only a colorable claim for relief and the lack of a factual finding from the state courts. *Ibid.* As to this issue – the only issue conclusively decided by the lower court – the federal circuits are in accord. *See United States v. Booth*, 432 F.3d 542, 546 (CA3 2005); *United States v. McCoy*, 410 F.3d 124, 134 (CA3 2005); *Beaty v. Stewart*, 303 F.3d 975, 993 (CA9 2002) (O'Scannlain, J.) ("[t]he pre-AEDPA standard for obtaining an evidentiary hearing is a 'reasonably low threshold for habeas petitioners to meet.' A petitioner is entitled to an evidentiary hearing if he asserts a colorable claim and a state court did not offer a 'full and fair hearing' on the claim."); *Smith v. United States*, 348 F.3d 545, 551 (CA6 2003); *United States v. Keogh*, 391 F.2d 138, 141 (CA2 1968). The lower court's exercise of discretion under *Townsend* is fully consistent with what this Court has held to be the "better practice," *De Marco v. United States*, 415 U.S. 449 (1974) (per curiam),[7] and is entirely within the scope of its authority under 28 U.S.C. § 2243 and Rule 8 of the Rules Governing Section 2254 Cases. *See Guidry v. Dretke*, 397 F.3d 306, 323-24 (CA5 2005) (where AEDPA does not bar hearing, Rule 8(a) gives district

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[7] In *DeMarco*, this Court held that when there exists a disputed factual issue that might be dispositive of the case, the "better practice [is] not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing." 415 U.S. at 450.

court broad discretion to conduct hearing).

Even assuming, for the sake of argument, that a pre-AEDPA federal habeas court faced with a claim of innocence would not be able to develop the factual record absent a higher showing than would be required for other claims, the cases in which this question would now arise are as rare as hen's teeth. Thus, as Justice Kennedy observed in a very analogous situation, such rarities do not merit this Court's full attention:

> By definition, the cases within the ambit of the Court's holding are confined to those in which the factual record developed in the state-court proceedings is inadequate to resolve the legal question. I should think those cases will be few in number. *Townsend v. Sain*, 372 U.S. 293, 318 (1963), has been the law for almost 30 years and there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts. And in my view, the concept of factual inadequacy comprehends only those petitions with respect to which there is a realistic possibility that an evidentiary hearing will make a difference in the outcome. This serves to narrow the number of cases in a further respect and to ensure that they are the ones, as JUSTICE O'CONNOR points out, in which we have valid concerns with constitutional error.

Keeney, 504 U.S. at 24 (dissenting opn.).

The Warden in this case points to no evidence whatsoever that this particular class of habeas corpus proceedings – *viz.* non-capital pre-AEDPA cases alleging actual innocence in which the federal habeas court seeks a more developed factual record – has burdened the dockets of the federal courts, or that it is likely to do so in the near future. It is quite unlikely today, over eleven years since the passage of the AEDPA, that more than a handful of such cases are still pending.

Of the circuit cases cited by the Warden that he contends "conflict" with the lower court's ruling in Mr. Henry's case (Pet. 9-10) (all but two of which are governed, unlike this case, by the

substantive provisions of the AEDPA),[8] none addresses the issue actually presented here: whether a court of appeals may remand a case, which is not governed by the substantive provisions of AEDPA, for an evidentiary hearing to determine whether the petitioner can adduce sufficient proof to substantiate a claim of actual innocence. Instead, the cited cases either (1) address completely different issues, such as (a) whether a claim of actual innocence is exempt from, or equitably tolls, the AEDPA statute of limitation,[9] or (b) whether a petitioner is entitled to relief on a claim of actual innocence when the state court held a hearing at which the newly discovered evidence was considered and found implausible,[10] or (2) reach a result preordained by AEDPA's choice-of-law provision, 28 U.S.C. § 2254(d)(1). *See Fielder v. Varner*, 379 F.3d 113, 122 (CA3 2004), *cert. denied*, 125 S. Ct. 904 (2005); *Foster v. Quarterman*, 466 F.3d 359, 367 (CA5 2006), *cert. denied*, 127 S. Ct. 2099 (2007); *Burton v. Dormire*, 295 F.3d 839, 842 (CA8 2002); *Johnson v. Bett*, 349 F.3d 1030, 1038 (CA7 2003); *LaFevers v. Gibson*, 238 F.3d

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[8] The only pre-AEDPA case from outside the Ninth Circuit, cited by the Warden is *Zuern v. Tate*, 336 F.3d 478, 482 n.1 (CA6 2003). That case is of no help to the Warden because it is inapposite. The petitioner in *Zuern* did not assert that he was actually innocent of a killing, only that he lacked the *mens rea* for aggravated murder under Ohio law. Therefore, the Sixth Circuit did not address the issue faced by the lower court in this case. If the Sixth Circuit in *Zuern* had held that *Herrera* conclusively rejected the cognizability of a freestanding claim of innocence based on newly discovered evidence, it would have been in error. As this Court recently indicated, that question remains open. *House v. Bell*, 126 S. Ct. 2064, 2086 (2006).

[9] *See, David v. Hall*, 318 F.3d 343, 347-48 (CA1 2003) (holding that claim is barred by statute of limitation, nevertheless examining newly proffered evidence and concluding that petitioner "has not made out a predicate showing of 'actual innocence.'"); *Rouse v. Lee*, 339 F.3d 238, 255 (CA4 2003) (en banc).

[10] *See Brownlee v. Haley*, 306 F.3d 1043 (CA11 Cir. 2002).

1263, 1265 n.4 (CA10 2001).[11] The important point to remember is that in this case, which is not governed by AEDPA's choice-of-law provision, the lower court simply applied established circuit precedent and ordered an evidentiary hearing because of the case's unique and peculiar facts.[12]

With rhetorical flourish, the Warden conjures the floodgate argument, contending that certiorari should be granted to "stem the inevitable tide of evidentiary hearings on freestanding actual innocence claims that will result from the Ninth Circuit's unprecedented and unwarranted order in this case." Pet. 16. He specifically cites Justice Scalia's concern in *Herrera* that by deciding the case on an arguendo assumption, the majority would cause innocence claims to become "routine and even repetitive," and Justice O'Connor's fear that unless federal habeas relief were reserved for truly persuasive demonstrations of actual innocence, the federal courts

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[11] The courts in the last two cases, *Johnson* and *LaFevers*, denied federal habeas relief only *after* carefully examining the petitioners' evidence of innocence and finding it wanting. *Johnson*, 349 F.3d at 1038 ("[t]he testimony [at the post-conviction hearing], even if we could consider it as a basis for habeas corpus, does not clear Basten"); *see also id.* at 1038-39. ("[t]here is no basis in this record to grant habeas relief based on this [newly discovered] evidence"); *LaFevers*, 238 F.3d at 1265 n.4 (concluding that "the absence of the victim's blood on Exhibit 83 does not demonstrate LaFevers' actual innocence").

[12] Perhaps recognizing that the alleged inter-circuit conflict is more superficial than substantive, the Warden relies upon an alleged *intra*-circuit conflict between this case and *Coley v. Gonzalez*, 55 F.3d 1385 (CA9 1995). *Coley* is an especially thin reed for the Warden for three reasons. First, an alleged conflict between panels of a single circuit is grounds for denying review. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of review where petition had alleged only intra-circuit conflict). Second, the court in *Coley* did not fully consider the question presented by this case because the petitioner had defaulted his claims and it was not clear whether he was raising a freestanding claim, or relying upon the fundamental-miscarriage-of-justice exception to the default bar. 55 F.3d at 1387. Third, the *Coley* panel erred in stating that *Herrera* stands for the proposition that innocence is not cognizable on habeas because, as this Court recently stated, that is an open question. *House*, 126 S. Ct. at 2086.

"will be deluged with frivolous claims of actual innocence." Pet. 11, 12. With 14 years of experience since *Herrera* was decided, we now know that the Justices' fears were not realized. In only about 16 cases per year were bare-innocence claims squarely presented to the federal courts:

> When only roughly sixteen cases a year are brought in federal courts in the U.S., most of which are summarily rejected with little or no discussion, it is clear that the consideration of bare-innocence claims comprise a negligible amount of the federal docket. The number of claims brought also belies Chief Justice Rehnquist's conjecture that "few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." Though the review implicit in Chief Justice Rehnquist's vision is more rigorous than current federal court practice, the relatively rare but persistent claims lodged by bare-innocence petitioners both before and after *Herrera* seem to indicate that the number of such petitioners is relatively small and finite.

Nicolas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 Am. Crim. L. Rev. 121, 131 (2005) (footnote omitted) (examining and categorizing 173 bare-innocence claims squarely before federal courts since *Herrera* was decided). Thus, even if AEDPA's choice-of-law provision did not preclude relief on freestanding claims of actual innocence, statistics from the last fourteen years belie the Warden's claim that the lower court's unpublished decision has opened a floodgate.[13]

III. The Fact-Centered, Case-Sensitive Ruling of the Lower Court Does Not Present an Extraordinary Case that Would Merit Immediate Review of an Interlocutory Order.

"Clearly, . . . this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American*

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[13] In the eight months since the lower court's decision was issued, it has not been cited once.

Construction Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372, 384 (1893). Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for denial of the application." *Ibid.*; *see also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review").

The Warden ignores the interlocutory nature of the lower court's ruling and fails even to attempt to make the required showing that immediate review by this Court is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. In fact, immediate review of the court of appeals' interlocutory ruling would be not only premature but particularly improvident because the ruling is entirely fact-centered and case-specific, and presents no issue "which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

IV. The Important Question of Whether Federal Habeas Corpus Relief is Available On a Truly Persuasive Demonstration of Actual Innocence Is Not Presented By This Case at this Interlocutory Stage.

As this Court recently explained, the question whether a freestanding claim of actual innocence is a cognizable ground for federal habeas corpus relief was left open in *Herrera*, and it remains open today. *House*, 126 S. Ct. at 2086. The lower court recognized that this question should be considered, as it was in *House*, on the basis of a complete factual record. Cases involving allegations of innocence are, by nature, contingent on a wide variety of factual

questions such as the relative weights to be given the testimony of witnesses at trial, and in post-conviction, or of two different witnesses. As the lower court recognized, when determining whether a petitioner would be entitled to relief on the basis of innocence a federal habeas court that is not subject to the restrictions of AEDPA "must review independently both the legal issues and those factual matters with which they are commingled." *Oyama v. California*, 332 U.S. 633, 636 (1948).

The lower court recognized that the petitioner in this case, in its present posture, makes a sufficient showing of innocence to merit factual development (a jury presented with evidence unavailable to Mr. Henry's jury acquitted his co-defendant of the crime of which Mr. Henry was convicted). But the court also did no more than assume, as this Court did on the pages of *Herrera* pinpointed in the court's opinion, that a freestanding claim of innocence would lie in habeas if it were based on truly persuasive evidence. Once the record is developed, it may be appropriate for this Court to consider the underlying constitutional question, but to do so now would be premature.

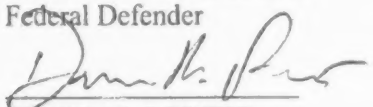
CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: November 8, 2007

Respectfully submitted,

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